STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2007
v	No. 264703 Macomb Circuit Court
SAMER FAWAZ, Defendant-Appellant.	LC No. 2004-000439-FC

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant, Samer Fawaz, appeals as of right his jury trial conviction of second-degree murder, MCL 750.317.[1] Because we are not persuaded by any of his arguments on appeal, we affirm.

I

Defendant first argues that the trial court erroneously admitted other-acts evidence testimony from Special Agent Peissig regarding the FBI's mortgage fraud investigation into the victim, defendant, and Farraj. In general, this Court reviews a trial court's decision regarding the admissibility of other-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The abuse of discretion standard is deferential and acknowledges that there is no single correct outcome; rather, there are multiple reasoned and principled outcomes. When a trial court chooses one of these principled outcomes, it does not abuse its discretion. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

To be admissible under MRE 404(b), other acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Our review of the testimony provided by Special Agent Peissig at trial demonstrates that it was offered for a proper purpose. His testimony revealed only that that the FBI was investigating defendant, Farraj, and the victim

[1] A single jury tried defendant, and his codefendant, Bashar Farraj. Farraj appeals his jury trial conviction for second-degree murder, MCL 750.317 in Docket No. 264235.

for mortgage fraud, and that he had seen Farraj and the victim together during a bank transaction that was part of the investigation. The testimony was proper to show a possible motive for the victim's murder. Also, the challenged testimony was relevant because "proof of motive in a prosecution for murder, although not essential, is always relevant[.]" *People v Rice*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

Further, defendant failed to establish that the disputed evidence should have been excluded under the balance test of MRE 403. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the trier of fact. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). The determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is "best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony." *People v Magyar*, 250 Mich App 408, 415-416; 648 NW2d 215 (2002). While the other acts evidence in issue may be viewed as prejudicial, in light of the weight of the evidence presented against defendants, and the fact that the record does not establish that it was given preemptive or undue weight, it cannot be characterized as unfair. See *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Accordingly, defendant failed to establish error based on the inclusion of the other acts evidence.

II

Defendant argues that the trial court erred when it instructed the jury on the necessarily included offense of second-degree murder because defendant's trial strategy was an all or nothing campaign. This Court reviews de novo a trial court's decision whether to instruct on a necessarily included lesser offense. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005).

The trial court has a duty to instruct the jury on the applicable law. MCL 768.29. An instruction on second-degree murder as a necessarily lesser included offense of first-degree murder is proper "if the intent element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder." *People v Cornell*, 466 Mich 335, 358 n 13; 646 NW2d 127 (2002). First-degree murder is second-degree murder with the added element of premeditation or the perpetration or attempted perpetration of an enumerated felony. *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975).

A review of the record reveals that the intent element differentiating first- and second-degree murder was at issue at trial. Although defendant's defense was that he was not involved in the alleged murder of the victim, a second-degree murder instruction was supported by a rational view of the evidence adduced at trial. The jury could have discounted the testimony about the sleeping bag box and knife packaging seen at Michigan Mortgage the day before the disappearance and found, that rather than killing the victim according to a premeditated plan, defendant and Farraj spontaneously killed the victim. The trial court properly decided to instruct the jury on second-degree murder, and therefore, defendant is not entitled to relief on this issue.

III

Defendant argues that error occurred during trial when the prosecutor impliedly commented on defendant's failure to testify and his failure to present an adequate defense. To

properly preserve a claim of prosecutorial misconduct, a defendant must promptly and specifically object to the offensive conduct. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The defense failed to object to the alleged offensive conduct thus this issue is unpreserved. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial right." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant specifically argues that error occurred during the following exchange at trial:

> *Defendant Farraj Counsel:* And I am sure that whatever the Detroit police evidence tech found we are going to hear later in this trial, would that be correct?
>
> *Officer Wisniewski:* If they found anything, yes.
>
> *Defendant Farraj Counsel:* Thank you.
>
> *Prosecutor:* What was that last question, your last question.
>
> *Defendant Farraj Counsel:* The last question was that she - - again, it is not voice dropping. The last question is that I'm sure that any evidence of anything of any evidentiary value that was found by the Detroit Police Department we are going to see at some point in this trial.
>
> *Prosecutor:* I'm going to object to those types of questions. I will prove the elements of this case beyond a reasonable doubt, and I will decide how to do that. *And, you know, if he wants to bring anything in, he can*. I object to that type of question.
>
> *Defendant Farraj Counsel:* The only comment would be that he's going to try to prove this case beyond a reasonable doubt.
>
> *The Court:* The objection is sustained. [Emphasis added.]

Defendant asserts that during this exchange, the prosecutor impliedly commented on his failure to testify and his failure to present an adequate defense. Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Because a criminal defendant has a constitutional right against compelled self-incrimination and may choose to rely on the presumption of innocence, a prosecutor may not comment on a defendant's failure to testify. *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). This Court has found that comments that burden the defendant's right not to testify, or shift the burden of disproving an element of the offense to the defendant, are improper. *Id*. at 112-113.

A prosecutor is entitled to fairly respond to issues raised by a defendant. *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003). A review of the remark in context reveals that the prosecutor was responding to implications flowing from defendant Farraj's counsel's

question to Officer Wisniewski. The prosecutor was not commenting on defendant's silence or attempting to shift the burden of disproving an element of the offense to defendant. In fact, the prosecutor stated that he would prove the elements of the case. Because the prosecutor's comments did not burden defendant's right not to testify, or shift the burden of disproving an element of the offense to the defense, the challenged comments were not improper. *Fields, supra.*

Moreover, to the extent that the challenged remarks could be viewed as improper, the trial court's instructions that defendant and Farraj did not have to offer any evidence or prove their innocence, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, and that the jurors were not to allow the fact that defendants did not testify affect the verdict in any way, were sufficient to cure any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Defendant has failed to show plain error affecting his substantial rights.

IV

Defendant argues that the trial court erred in denying his motion to quash the information because the evidence presented at the preliminary examination did not support a probable cause determination that he committed the charged crimes. Defendant also argues that the trial court erred when it denied his motion for directed verdict at the close of the prosecutor's case, because the evidence was clearly insufficient to convict him of the charged crimes.

This Court reviews a trial court's decision with regard to a motion to quash information for an abuse of discretion. *People v Clement*, 254 Mich App 387, 389; 657 NW2d 172 (2002). . A district court must bind over a defendant for trial when the prosecutor presents competent evidence constituting probable cause that a felony was committed and that the defendant committed it. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). Probable cause requires a reasonable belief that the evidence presented at the preliminary examination is consistent with the defendant's guilt. *Id*. at 575. Circumstantial evidence, considered with the inferences arising from it, is sufficient to establish probable cause. *Id*. To bind a defendant over for trial, a district court must find that there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred." *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000) (citation omitted). However, an erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless if sufficient evidence is presented to support a conviction at trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

In reviewing a claim from the denial of a directed verdict motion, we must review the evidence that has been presented up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Burgenmeyer*, 461 Mich 431, 434; 606 NW2d 645 (2000).

To convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). To prove a conspiracy to commit murder,

> it must be established that each of the conspirators have [sic] the intent required for murder and, to establish that intent, there must be foreknowledge of that intent. Foreknowledge and plan are compatible with the substantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation. [*People v Hammond*, 187 Mich App 105, 108; 466 NW2d 335 (1991) (citation omitted).]

Circumstantial evidence and reasonable inferences therefrom may constitute sufficient evidence to find all the elements of an offense beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A review of the record reveals that the testimony at trial was sufficient to establish that defendant Fawaz committed the crimes charged. Despite the lack of the victim's body as evidence, based on Dr. Spitz's testimony that the bloodstains found at the scene were sufficient in volume to indicate that a death had occurred at Michigan Mortgage, and the DNA evidence showing that the blood at the scene matched the victim's DNA profile, the jury could infer that the victim is deceased. This conclusion is further supported by the testimony that friends or family had not seen the victim since the date of the incident.

Sufficient evidence also existed to establish that defendant and Farraj caused the victim's death. Marlin and Eddie Rayes placed defendant and Farraj at the scene of the crime early in the morning when they were not usually present. Defendant and Farraj both stated that a friend had been at the office earlier in an attempt to explain the vomit smell and stains. They also attempted to explain that the bloodstains present were actually cranberry juice. Defendant and Farraj also pointed out two holes in the walls that were not there the day before, stated that they had cleaned the scene, and also left and returned with replacement mats for the blood-stained mats. Police also found blood in the cargo area of Farraj's black Trailblazer that both defendant and Farraj were seen riding in on a daily basis.

Sufficient evidence also existed to establish that defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Intent and premeditation may be inferred from the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). The presence of the sleeping bag box and the knife packaging present at the scene the day before the incident is evidence of premeditation and deliberation. Further, the fact that defendant and Farraj attempted to clean the scene and procure replacement mats could be viewed as premeditation and deliberation. Also, the prosecution presented evidence that there were dark stains that resembled blood on the concrete in front of the front door of the scene, and that the carpeting in the back of the black TrailBlazer had been cut out and was missing during the investigation. All of this evidence viewed together is strong circumstantial evidence of premeditation and deliberation.

Sufficient evidence also existed to establish that defendant and Farraj conspired to commit the victim's murder. The testimony showed that defendant and Farraj were constantly together. Defendant and Farraj drove to work together in the same vehicle, started work at the same time, and worked together in the same office. Defendant and Farraj were at the scene together on the morning after the incident occurred at an unusual hour for them. They both

stated that a friend had been at the office, cleaned the office, left together to purchase replacement mats, returned together with the mats, and then left the office together. This evidence is sufficient to establish that defendant and Farraj conspired together to commit the victim's murder.

At trial, the prosecutor presented evidence sufficient to enable a rationale jury to find beyond a reasonable doubt that a killing occurred at the scene, that the victim was murdered, that defendant committed the murder with premeditation and deliberation, and that defendant and Farraj conspired to commit the victim's murder, therefore the trial court did not err when it denied defendant's motion for directed verdict. For the same reasons, we conclude that the evidence was sufficient to support convictions for the charged crimes at trial, and any deficiency in the proofs presented at the preliminary examination was harmless. *Libbett, supra*.

V

Defendant next argues that the trial court erred when it allowed Dr. Spitz to testify regarding the cause of death when his opinion was nothing more than speculation and did not meet the requirements for admissibility under MRE 702. This Court reviews a trial court's findings of fact on the admissibility of scientific evidence for clear error. *People v Holtzer*, 255 Mich App 478, 484; 660 NW2d 405 (2003). We also review the court's ultimate decision to admit expert witness testimony for an abuse of discretion. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

The appropriate test for admissibility in Michigan is the reliability standards test announced in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). MRE 702 incorporates the *Daubert* standards and identifies three key criteria: "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702. And our Supreme Court has held that expert testimony is admissible under MRE 702 if the witness is an expert, there are facts in evidence that require examination by a competent expert, and the expert has knowledge that belongs more to an expert than an ordinary person. *Gilbert, supra.*

At the *Daubert* hearing, Dr. Spitz testified that he was currently the Medical Examiner for Macomb County; he was previously a medical examiner for Wayne County; he is a licensed physician in the Michigan; his specialty is forensic pathology; has written a textbook in forensic pathology; has visited thousands of crime or death scenes; has performed thousands of autopsies on people who died from bleeding; and he has been practicing in forensic pathology since 1953. Both defendants' counsel stipulated to Dr. Spitz's qualifications and expertise in the area of forensic pathology. Dr. Spitz visited the scene of the crime in this case. He viewed the blood on the pavement outside the storefront, and on the walls and floor of the office. He stated that the blood had been partially removed from the scene. He also reviewed photographs of the crime scene.

Dr. Spitz stated that his testimony was based on his observations at the crime scene and his review of the photographs taken by the evidence technicians. He further testified that his formula regarding blood loss and exsanguinations was accepted in the scientific community and

that he had employed it in his extensive work as a forensic pathologist for over 52 years. Dr. Spitz stated that he was confident that he had reliably applied these accepted principles and methods to the evidence in this case.

Under MRE 702, testimony will be admitted if it is based on sufficient facts or data, is a product created from reliable principles and methods, and the witness has reliably applied the principles and methods to the facts of the case. Given Dr. Spitz's training and experience, it was clear that his knowledge of forensic pathology and forensic medicine was based on reliable forensic principles, which he applied to the facts in this case using the evidence from the scene and crime scene photographs, to determine that the victim died from blood loss due to a major bleed following a struggle. Therefore, Dr. Spitz's testimony satisfied MRE 702, and we find no error in the trial court's admission of the expert testimony.

VI

Defendant argues that under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), he is entitled to be sentenced only on those facts actually found by the jury. This issue is properly preserved because defendant raised his sentencing issues at sentencing. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003). Because this issue is properly preserved, this Court reviews the imposition of a sentence for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

In *Blakely*, the United States Supreme Court held that it is a violation of the Sixth Amendment for a trial court to increase a defendant's sentence beyond the maximum sentence permitted by law on the basis of facts found by the court rather than the jury. *Blakely, supra*. However, *Blakely* has been held to apply only to determinate sentencing based on judicial fact-finding and not to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 161, 163-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Therefore, this argument lacks merit.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio